Volume 91
Issue 4 *Dickinson Law Review - Volume 91, 1986-1987*

6-1-1987

# A View Against Strict Employer Liability Under Title VII for Sexually Offensive Work Environments Created by Supervisory Personnel: Meritor Savings Bank v. Vinson

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# NOTABLE STUDENT WORKS

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## I. Introduction

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[1]

The quotation above epitomizes the stereotypical view of the role of women prior to the twentieth century. Today's society has brought with it a dramatic change in the legal and socioeconomic status of women,[2] yet many traditional stereotypes still remain. Women comprise approximately forty percent of the work force in the United States today,[3] and the number is rapidly increasing. The rising number of women entering the work force yields a proportionate increase in the problems that women encounter on the job because of gender-based discrimination. One form of discrimination is sexual harassment.[4] Sexual harassment in the workplace is a major

1. Bradwell v. Illinois, 83 U.S. 130, 141 (1873) (Bradley, J., concurring).

2. Note, *Differing Standards of Employer Liability for Sexual Harassment of Working Women*, 27 ARIZ. L. REV. 155 (1945).

3. M. COELI MEYER, J. OESTRIECH, F. COLLINS, T. BERCHTOLD, SEXUAL HARASSMENT 3 (1981) [hereinafter COELI MEYER].

4. The term sexual harassment is difficult to define and is frequently discussed by means of examples. Sexual harassment may include verbal abuse, sexist remarks regarding a woman's clothing or body, patting, pinching, or brushing up against a woman's body, leering or ogling,

problem confronting women in today's society.[5] It denies women the same working conditions that are enjoyed by similarly situated men.[6] A body of law has developed holding employers primarily responsible for allowing this problem. This paper will provide an overview of the development of this area of law and will examine the standards used to evaluate employer liability for sexual harassment by supervisors, coworkers and nonemployees. The possible implications arising from the first sexual harassment case accepted by the United States Supreme Court will also be considered.[7]

## II. History of Sexual Harassment

Title VII of the Civil Rights Act of 1964[8] makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."[9] The legislative history of the 1972 amendments to Title VII reveals that Congress desired the statute to be broadly construed, in order to eliminate sex based discrimination in employment.[10] Eventually the courts recognized that sexual harassment constitutes discrimination based on sex, and is therefore prohibited by Title VII.[11]

The roots of a claim under Title VII for sexual harassment can

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demand for sexual favors in return for hiring, promotion or tenure, physical assault or rape. *Id.* at 4.

5. A report on a number of surveys shows that between 49 to 90% of women in various occupations surveyed reported experiencing sexual harassment at work. C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 26-32 (1979). It should be noted that sexual harassment is a problem experienced by men as well as women. A study conducted by two UCLA psychologists in 1979 which included men and women in the Los Angeles area revealed that 47% of the women surveyed experienced admiring sexual comments on the job as compared with 45% of the men surveyed, 33% of the women experienced leering or touching as compared with 31% of the men, and 11% of the women stated that they were expected to sleep with the boss or an influential coworker to keep their jobs as compared with 6% of the men. COELI, MEYER, *supra* note 3 at 5.

6. Williams v. Saxbe, 413 F. Supp. 654, 657 (D.D.C. 1976), *rev'd and remanded on other grounds sub nom*; Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1976), *decision on remand sub nom*; Williams v. Civiletti, 487 F. Supp. 1387 (D.D.C. 1980).

7. Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), *reh'g denied* 760 F.2d 1330 (D.C. Cir. 1985), *aff'd and remanded sub nom.*, Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986) [hereinafter Vinson v. Taylor].

8. 42 U.S.C. § 2000e-2(a)(1) (1982) [hereinafter Title VII].

9. *Id.*

10. Williams v. Saxbe, 413 F. Supp. 654, 658 (D.D.C. 1976); *see also* Note, *The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace*, 24 WASH. L.J. 575, 580 (1985).

11. *See infra* note 22 and accompanying text.

generally be traced to *Corne v. Bausch and Lomb, Inc.*[12] In *Corne*, the female plaintiffs complained that the repeated verbal and physical advances of their male supervisor caused them to leave their jobs. They sued both the supervisor and the employer, Bausch and Lomb, alleging that the supervisor's persistent sexual advances had become a condition of their employment within the meaning of Title VII.[13] The plaintiffs also asserted that the employer was subject to liability under Title VII for permitting the advances to continue.[14] The court granted both the supervisor's and the employer's motion to dismiss, holding that sexual advances do not constitute sex discrimination.[15]

In reaching this conclusion, the court reasoned that the supervisor's conduct constituted nothing more than "personal proclivity, peculiarity or mannerism," and that he was doing nothing more than "satisfying a personal urge."[16] With respect to the employer's liability, the court held that, because the employer would in no way benefit from the supervisor's unsavory personal conduct, the alleged harassment was not employment related, and therefore the employer had not discriminated on the basis of sex.[17]

In *Williams v. Saxbe*,[18] decided only one year after *Corne*, the District Court for the District of Columbia recognized sexual harassment as sex based discrimination prohibited by Title VII. In *Williams*, the plaintiff alleged that after she rebuffed a sexual advance made by her supervisor, the supervisor's attitude towards her changed dramatically. She asserted that prior to the rejected sexual advance the working relationship with her supervisor was good, but after the rejected advance the supervisor engaged in a continuing pattern and practice of sexual harassment.[19] The plaintiff was discharged approximately three months after the alleged sexual advance, purportedly because of poor work performance.[20] The defendants argued that the plaintiff had not been denied employment

12. 390 F. Supp. 161 (D. Ariz. 1975), *vacated without opinion*, 562 F.2d 55 (9th Cir. 1977). While most commentators suggest that the seminal case for a sexual harassment claim under Title VII is *Corne*, see Barnes v. Train, 13 Fair Empl. Prac. Cas. (BNA) 123 (D.D.C. 1974), *rev'd sub nom.* Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). The court granted summary judgment in favor of defendant on the ground that Title VII does not offer redress for a plaintiff's claim that her job was terminated because she refused her male supervisors sexual advances.

13. 390 F. Supp. at 162.

14. *Id.*

15. *Id.* at 163-64.

16. *Id.* at 163.

17. *Id.*

18. 413 F. Supp. 654 (D.D.C. 1976).

19. *Id.* at 655-66.

20. *Id.*

opportunity because she was a woman, but because she was unwilling to perform the alleged sexual demands. The defendants further asserted that the "plaintiff is in no different class from other employees, regardless of their gender or sexual orientation, who are made subject to such carnal demands."[21] The court rejected this argument as excessively narrow, stating that it failed to recognize that "The conduct of the plaintiff's supervisor created an artificial barrier to employment which was placed before one gender and not the other, despite the fact that both genders were similarly situated."[22]

The decision in *Williams v. Saxbe* laid the foundation for other courts to recognize that sexual harassment constitutes sex discrimination within the meaning of Title VII. Since that decision, a substantial majority of the courts now follow the lead of *Williams v. Saxbe*, broadly construing Title VII to carry out the congressional intent of eliminating discrimination based on sex.[23]

## III. Types of Sexual Harassment

Courts have generally recognized two distinct categories of sexual harassment under Title VII.[24] The classic example of sexual harassment is characterized as quid pro quo. Quid pro quo sexual harassment occurs when a tangible loss of job benefits is involved, as in the case of a supervisor making sexual demands upon a subordinate in exchange for career advantages or under threat of adverse job consequences.[25] The second category of sexual harassment has been characterized as environmental. Environmental sexual harassment occurs when the employee is subjected to sexually related conduct which interferes with the work performance or which creates an intimidating, hostile or offensive working environment, regardless of whether the employee is threatened with actual economic consequences.[26]

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21. *Id.* at 657 (quoting Defendant's Brief in Support of Motion to Dismiss).

22. *Id.* at 657-58.

23. *See, e.g.*, Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985); Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Kyriazi v. Western Electric Co., 461 F. Supp. 894 (D.N.J. 1978).

24. *See* Note, *supra* note 10.

25. Downes v. FAA, 775 F.2d 288, 290 (Fed. Cir. 1985). When an unwanted sexual advance occurs, quid pro quo harassment can take on one of three possible shapes. In situation one the woman declines the advance and forfeits an employment opportunity; the scenario is usually: sexual advance, noncompliance, employment retaliation. In situation two, the woman complies and does not receive a job benefit. In situation three, the woman complies and receives the job benefit. *See* MACKINNON, *supra* note 5 at 32.

26. Vinson v. Taylor, 753 F.2d 141, 144-45 (D.C. Cir. 1985); Bundy v. Jackson, 641 F.2d 934, 944 (D.C. Cir. 1981).

Prior to 1981 the courts recognized that only the quid pro quo form of sexual harassment presented a claim for sex based discrimination under Title VII.[27] The landmark case of *Bundy v. Jackson*,[28] however, established that "conditions of employment" include the psychological and emotional work environment and that sexually stereotyped insults and demeaning propositions which poison that environment may result in an actionable claim for sexual harassment under Title VII.[29]

In *Bundy*, plaintiff's immediate supervisor subjected her to repeated inquiries about her sexual proclivities, numerous sexual advances and a request to join him at a motel and on a business trip to the Bahamas. When Bundy complained to a higher authority, that supervisor replied that "any man in his right mind would want to rape you" and then proceeded himself to make sexual advances towards her.[30] In an opinion by Chief Justice Wright, the Circuit Court of Appeals for the District of Columbia found, for the first time, that a claim for sexual harassment under Title VII need not involve any threatened loss of tangible job benefits. Blazing a new trail for relief under Title VII, the court opined:

> [U]nless we extend the *Barnes* holding, an employer could sexually harass a female employee with impunity by carefully stopping short of firing the employee or taking any other tangible action against her in response to her resistance, thereby creating the impression . . . that the employer did not take the ritual of harassment and resistance seriously.[31]

After *Bundy*, courts generally recognize the insufficiency of a legal theory of sexual harassment that does not allow a context of unwarranted advances to be actionable. Such a theory would effectively permit all sexual harassment that stops short of a victim quitting or being fired.[32] One well known authority also criticizes the

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27. *See* Bundy v. Jackson, 641 F.2d 934.

> Though no court has yet so held, we believe that an affirmative answer follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination.

*Id.* at 943-44.

28. 641 F.2d 934 (D.C. Cir. 1981).

29. *Id.* at 944.

30. *Id.* at 940.

31. *Id.* at 945.

32. *See, e.g.*, Vinson v. Taylor, 753 F.2d 141, 145 (D.C. Cir. 1985); Jeppson v. Wunnicke, 611 F. Supp. 78, 83 (D. Alaska 1985); Henson v. City of Dundee, 682 F.2d 897, 908, n. 12 (11th Cir. 1982).

construction that no series of sexual advances alone is sufficient to justify legal intervention until it is expressed in the quid pro quo form, admonishing that this "forces the victim to bring intensified injury upon herself in order to demonstrate that she is injured at all."[33]

The Equal Employment Opportunity Commission (hereinafter EEOC) guidelines[34] have also adopted the position that a sexual harassment claim under Title VII does not require the loss of tangible job benefits. While these guidelines are only regulations, the United States Supreme Court has indicated that they are to be given "great deference."[35] The EEOC guidelines have adopted a very broad definition of sexual harassment. According to the guidelines:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis of employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.[36]

While it is difficult to precisely define all of the conduct that may constitute sexual harassment, one commentator suggests that any unsolicited non-reciprocal male behavior that asserts a woman's sex role over her function as a worker is sexual harassment.[37] Courts have generally taken a case by case approach in deciding if the alleged conduct falls within the definition;[38] but it is clear that even under the broad EEOC guidelines there exist some limitations in defining conduct which will constitute sexual harassment. Sexual harassment must be "unwelcomed"; that is, the employee must not have solicited or incited the conduct, and she must have regarded the conduct as offensive and undesirable.[39] The conduct also must affect a

33. *See* MACKINNON, *supra* note 5, at 46-47.

34. 29 C.F.R. § 1604.11(a) (1984).

35. Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); *but see* General Electric v. Gilber, 429 U.S. 125, 141-42 (1976) (guidelines given mere consideration).

36. 29 C.F.R. § 1604.11(a) (1984).

37. L. FARELY, SEXUAL SHAKE DOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB at 14-15 (1978).

38. *See* F. Suggs, *Advising Your Corporate Client on Avoiding Charges of Sexual Harassment*, 46 ALA. LAW. 176, 177 (July, 1985) (suggesting that the decision of what constitutes sexual harassment depends on the totality of the circumstances).

39. 29 C.F.R. § 1604.11(a) (1984).

term or condition of employment or be a "basis" for employment decisions.[40] Furthermore, if the conduct does not affect employment, it does not fall within the definition of sexual harassment.[41]

In deciding these cases, courts generally utilize a totality of circumstances approach in evaluating what constitutes sexual harassment.[42] Factors such as the extent to which the conduct affected the terms and conditions of employment, whether the conduct is repeated or isolated, whether the conduct was intended or perceived seriously or in jest, and the degree to which the conduct is contrary to community standards, are considered in determining whether the conduct constitutes sexual harassment.[43]

## IV. Establishing a Cause of Action for Sexual Harassment

Most commentators suggest that all sexual harassment claims are examined under a disparate treatment theory.[44] The courts, however, seem to employ different standards for evaluating sexual harassment cases under Title VII, depending on whether the case falls into the quid pro quo category or the hostile work environment category. In quid pro quo cases the courts consistently have employed disparate treatment analysis because the discrimination almost always occurs in a one-on-one setting.[45] In hostile work environment cases, however, the courts tend to proceed under a disparate impact type of theory.[46] This may occur because, in certain situations, the conduct has an effect not only on a particular individual, but on an entire class of individuals. Consequently, the type of sexual harass-

40. *Id.*

41. *Id.*

42. *See* Suggs, *supra* note 38.

43. *See* Suggs, *supra* note 38, at 177-78.

44. Bryan, *Sexual Harassment as Unlawful Discrimination Under Title VII of the Civil Rights Act of 1964*, 14 LOY. L. REV. 25, 39 (1980).

45. See generally McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) where the Court addressed the allocation of proof in a private, non class action challenging employment discrimination under Title VII. The Court found that in a racial discrimination case the individual must establish:

> (i) that he belongs to a racial minority,
>
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants,
>
> (iii) that, despite his qualifications he was rejected, and,
>
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

When the individual has established these elements, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.

46. For an interesting discussion of why the analytical framework of a disparate treatment analysis is more adaptable to the harassing work environment situation, *see* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1456 (1984).

ment may become important in determining the particular analysis under which the court will proceed.

Although many commentators suggest that the courts apply these standards in sexual harassment cases, the evaluation really depends on the particular facts of a given case.[47] To date, the courts have not uniformly established a clear standard which can be applied neatly in every case. In *Henson v. City of Dundee*,[48] however, the Eleventh Circuit Court of Appeals attempted to clarify the elements needed to establish a prima facie case of sexual harassment. According to the court in *Henson*, in order for an employee to prove a prima facie case, the employee must show that: (1) the employee belongs to a protected group; (2) the employee was subjected to unwelcome sexual harassment; and (3) the harassment complained of was based upon sex.[49] Once the plaintiff has established the existence of these elements, the burden shifts to the employer to prove by clear and convincing evidence that the plaintiff's alleged employment related harms were not the result of sexual harassment.[50] It is interesting to note that although *Henson* was an environmental harassment case, the court purported to decide the issues applying a disparate treatment analysis. The court simply modified the prima facie standards set forth by the Supreme Court in *McDonnell Douglas v. Green*[51] to fit this particular pattern of facts.

## V. Employer Liability for Acts of Third Parties

Individuals who engage in harassing conduct may be held individually liable under the tort theories of assault, battery, invasion of privacy, interference with contractual relations, and intentional infliction of emotional distress.[52] Employers, however, also may be held accountable under Title VII for the actions of both employees and non-employees.[53] When a claimant brings a sexual harassment claim under Title VII, the employer is typically joined with the harassing individual as a defendant. The federal district court in which the action is brought adjudicates the Title VII claim and may proceed to exercise pendent jurisdiction over the tort claims, assuming that both

47. *See* Suggs, *supra* note 38, and accompanying text.
48. 682 F.2d 897 (11th Cir. 1982).
49. *Id.* at 903.
50. Bundy v. Jackson, 641 F.2d 934, 951.
51. 411 U.S. 792 (1973); *see supra* notes 45-46, and accompanying text.
52. *See* Note, *supra* note 10, at 597.
53. *See, e.g.*, Vinson v. Taylor, 753 F.2d 141; Williams v. Saxbe, 413 F. Supp. 654; EEOC v. Sage Realty, 507 F. Supp. 599 (S.D.N.Y. 1981).

claims arise from a common nucleus of operative facts.[54] It is important to recognize that Title VII only provides certain limited remedies, including reinstatement with back pay, and injunctions.[55] Additionally, Title VII permits a claimant to recover attorneys fees but does not allow recovery of punitive damages.[56] Consequently, the strategy of joining the individual and the employer in a suit brought under Title VII allows the claimant to also recover compensatory damages, as well as possible punitive damages against the individual under the pendent tort claim. At the same time, the claimant is compensated for any adverse employment consequences which flow from the individual's conduct. While it is clear that employers may be liable under Title VII for the actions of supervisors, coworkers and even non-employees,[57] it is unclear under what circumstances liability will be imputed to the employer.

Section 706(g) of Title VII authorizes judicial relief if the unlawful employment practice is found to be intentional. That section provides in pertinent part:

> If the [district] court finds that the respondent [to the unlawful employment practice charge] has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate.[58]

In discussing the amendment to Title VII, Senator Hubert H. Humphrey (D. Minnesota) described the change in Section 706(g) and the intent requirement as follows:

> Section 706(g) is amended to require a showing of intentional violation of the title in order to obtain relief. This is a clarifying change. Since the title bars only discrimination because of race, color, religion, sex, or natural [sic] origin it would seem already to require intent, and thus the proposed change does not involve any substantive change in the title. The express requirement of intent is designed to make it wholly clear that inadvertent or

54. *See* Note, *supra* note 10, at 596. The "common nucleus of operative facts" requirement for pendent jurisdiction is almost always met since both the federal and state claims result from the individual's conduct.

55. 42 U.S.C. § 2000e-5(g) (1982); *see also*, Note, *Kyriazi v. General Electric Co.: Damages for Sexual Harassment Title VII and State Tort Law*, 10 CAP. U.L. REV. 657, 662 (1981).

56. 42 U.S.C. § 2000e-5(k) (1982). For a discussion of damages recoverable under Title VII, see generally Note, *supra* note 55.

57. *See infra* notes 63, 72, 85 and accompanying text.

58. 42 U.S.C. § 2000e-5(g) (1982).

> accidental discriminations will not violate the title or results in entry of court orders. It means simply that the respondent must have intended to discriminate.[59]

The United States Supreme Court has also repeatedly ruled that "proof of discriminatory motive is critical" in disparate treatment cases under section 703(a)(1).[60] Because sexual harassment is generally treated under a disparate treatment analysis,[61] proof of discriminatory intent would seem to be required by the statute. The courts, however, have not adopted a steadfast rule for determining under what circumstances intent will be imputed to the employer for the actions of third parties. As a result, different standards have been used to evaluate the employer's liability under Title VII, depending on the identity of the individual who engaged in the harassing conduct, and the type of sexual harassment alleged.[62]

The courts which have addressed the issue of employer liability for harassment by non-employees have generally agreed that liability is limited to situations where the employer had actual or constructive notice of the conduct and failed to remedy it. The decision in *EEOC v. Sage Realty*[63] is instructive in this area. In that case the employer required a female lobby attendant to wear a revealing uniform during working hours.[64] The uniform solicited unwelcomed sexual comments and gestures from passersby.[65] The plaintiff informed the employer that she would no longer wear the uniform because of the harassing comments and questions it incited.[66] The employer then gave the plaintiff an ultimatum, requiring her either to wear the uniform or to face termination.[67] The plaintiff chose instead to quit her job. The court held that the employer was liable since it knew of the sexual harassment and did nothing to prevent it. The court reasoned that the employer had imposed a condition of employment on the plaintiff by requiring her to remain in a position where she would be

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59. 110 Cong. Rec. 12723-24 (June 4, 1964).

60. *See, e.g.*, International Bd. of Teamsters v. U.S., 431 U.S. 324, 335 n. 15 (1977); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1983); Furn Co. Construction v. Walters, 438 U.S. 567, 579 (1978) (holding that the absence of showing a discriminatory intent required reversal of the court of appeals' order that the employer alter a certain hiring practice).

61. *See supra* notes 41-54 and accompanying text.

62. *See infra* notes 63, 68-69, 81-82, 84, 95 and accompanying text.

63. 507 F. Supp. 599 (S.D.N.Y. 1980).

64. *Id.* at 604.

65. *Id.* at 605.

66. *Id.*

67. *Id.* at 606.

subjected to sexual harassment while working.[68]

The EEOC guidelines are in accord with the court's holding in *Sage*. The guidelines provide:

> An employer may also be liable for the acts of nonemployees, with respect to sex harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the commission will consider the extent of the employers control and any other legal responsibility which the employer may have with respect to the conduct of such nonemployees.[69]

The guidelines do not expressly mention the intent requirement expressed in section 706(g) of Title VII.[70] Nevertheless, it would appear from the *Sage* decision, and the guidelines themselves, that intent to discriminate will be imputed to an employer only where the employer is aware or should be aware of harassing conduct by a nonemployee and fails to remedy the situation.

Similarly, in the case of sexual harassment by non-supervisory employees, the courts and the EEOC are generally in agreement that the employer must have actual or constructive notice of the harassing conduct to impose liability under Title VII.[71] In *Katz v. Dole*,[72] the plaintiff was an air traffic controller. The working atmosphere was pervaded with insult and innuendo, and the plaintiff was personally the object of verbal sexual harassment by her fellow controllers.[73] The plaintiff's supervisors were alerted to the problem and one supervisor heard other controllers referring to the plaintiff in an obscene manner.[74] In addressing the issue of employer liability, the court held that in addition to proving her prima facie case, the plaintiff also must show that the employer knew or should have known of the harassment and took no effectual action to correct the situation.[75] The court stated that because the harassment was so pervasive and the plaintiff specifically complained of the conduct to the management, the employer was or should have been aware of the problem.[76] The court then proceeded to find the employer liable for

68. *Id.* at 609.
69. 29 C.F.R. § 1604.11(e) (1984).
70. 42 U.S.C. § 2000e-5(g) (1982).
71. *See* Suggs, *supra* note 38, at 179.
72. 709 F.2d 251 (4th Cir. 1983).
73. *Id.* at 254.
74. *Id.*
75. *Id.* at 256.
76. *Id.*

its failure to remedy the situation effectively, in spite of the presence of an official policy against harassment.[77]

In *Kyriazi v. Western Electric Co.*,[78] the District Court of New Jersey found the employer liable for the actions of coemployees who shot rubberbands at the plaintiff, engaged in boisterous speculations about her virginity, and circulated an obscene cartoon depiction of her.[79] The court concluded that because two supervisors knew of the conduct and failed to stop it, liability was fairly imputed to the employer.[80]

Other courts have also found employers liable for the harassing conduct of nonsupervisory employees of which the employer had notice but which it failed to remedy.[81] The EEOC guidelines are in accord with the position adopted by the courts, providing for employer liability with respect to conduct between fellow employees where the employer is or should be aware of the conduct and fails to take appropriate corrective action.[82]

While the courts and the EEOC are in general agreement about employer liability for acts of nonemployees and coworkers, substantial disparity exists in the area of employer liability for the actions of supervisory personnel. The confusion exists because Title VII's definition of "employer" includes "any agent" of the employer, and supervisors are the employer's agents in the supervision of employees.[83] Therefore, the question becomes whether the supervisor and the employer are a single entity so that liability is automatically imputed to the employer, or whether the employer must have some independent actual or constructive knowledge of the supervisor's conduct in order for liability to be imputed to it. Considering the statutory intent requirement of section 706(g), this question becomes even more perplexing.

Most of the circuit courts which have addressed the question of employer liability for sexual harassment by supervisors have generally concluded that the employer must be placed on notice of the

77. *Id.*
78. 461 F. Supp. 355 (D.N.J. 1979), *aff'd* 647 F.2d 388 (3d Cir. 1981).
79. *Id.* at 834-35.
80. *Id.* at 941.
81. *See, e.g.*, Continental Can v. Minnesota, 297 N.W.2d 241 (Minn. 1980).
82. 29 C.F.R. 1604.11(d) (1984).
83. 42 U.S.C. § 2000e(b) (1982). This section provides in pertinent part:

> The term employer means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . .

harassment and have an opportunity to cure it.[84] In *Henson v. City of Dundee*,[85] the plaintiff sought to impose liability on the employer for a harassing work environment created by her supervisor. The Eleventh Circuit Court of Appeals stated that, in such a situation, the plaintiff "must show that the employer knew or should have known of the harassment" and failed to remedy it.[86] The court further opined that a plaintiff can demonstrate employer knowledge by "showing that she complained to higher management of the harassment, or by showing the pervasiveness of the harassment, which gives rise to an inference of knowledge or constructive knowledge."[87]

In *Craig v. Y and Y Snacks, Inc.*,[88] the plaintiff alleged that she was discharged as a result of refusing the sexual advances of her supervisor. She also notified the company's president of her discharge and of her suspicion that it resulted from the incident with her supervisor.[89] In holding the employer liable for the supervisor's harassment and subsequent discharge of the plaintiff, the Third Circuit Court of Appeals pointed out that the corporate president "had actual notice of the discharge and failed to take adequate remedial steps."[90]

This finding may have been influenced by the decision in *Bundy*,[91] the case in which the District of Columbia Circuit Court of Appeals imposed liability on the employer because agency officials had "full notice of the harassment committed by agency supervisors and did virtually nothing to stop or remedy it."[92] In reaching this conclusion, the court in *Bundy* suggested that under its earlier decision in *Barnes v. Costle*,[93] the employer would not be liable if the supervisor had acted in contravention of employer policy, without the employer's knowledge, and the employer had promptly rectified the situation.[94]

In contrast to these decisions, some circuit courts have held employers strictly liable for the actions of their supervisors. In *Miller v. Bank of America*,[95] the plaintiff alleged that she was fired for rebuff-

84. *See* Note, *supra* note 2, at 160.
85. 680 F.2d 897 (11th Cir. 1982).
86. *Id.* at 905.
87. *Id.*
88. 721 F.2d 77 (3d Cir. 1983).
89. *Id.* at 78-79.
90. *Id.* at 80.
91. 641 F.2d 934 (D.C. Cir. 1981).
92. *Id.* at 943.
93. 561 F.2d 983 (D.C. Cir. 1977).
94. Bundy v. Jenkins, 641 F.2d 934, 943 (citing *Barnes*, 561 F.2d at 993).
95. 600 F.2d 211 (9th Cir. 1979).

ing sexual demands made by her supervisor. The defendant employer had an established policy against sexual harassment and provided an internal grievance procedure for complaints, but the plaintiff had failed to avail herself of the established procedure.[96] The Ninth Circuit Court of Appeals, treating sexual harassment as "a tort-like wrong," applied the theory of respondeat superior and found the employer liable for the supervisor's actions.[97] The court reasoned that because the supervisor was authorized to hire, fire, discipline, and promote, it was fair to hold the employer liable under Title VII.[98] Similarly, the Seventh Circuit Court of Appeals in *Horn v. Duke Homes*[99] purported to follow a rule of absolute liability.[100] In finding the employer liable for the supervisor's discharge of the plaintiff for declining to succumb to the supervisor's sexual requests, the court opined that "It was Congress' judgment that employers, not the victims of discrimination, should bear the cost of remedying and eradicating employment discrimination. The strict liability rule is admirably suited for this purpose. Indeed, courts have applied this rule without hesitation in every Title VII context except sexual harassment."[101]

It should be noted that most of the cases imposing strict liability on the employer for actions of supervisory personnel are of the quid pro quo type, where loss of some tangible job benefit is involved.[102] In this situation a supervisor uses his power to affect adversely an employee's job in retaliation for a refusal by the employee to succumb to requests for sexual favors, thereby invoking the clout of the employer and therefore standing in the shoes of the employer.[103] One court, however, has recently adopted the view that an employer is strictly liable for the conduct of its supervisor when that supervisor has created a hostile or offensive work environment even though no loss of tangible job benefits is threatened.[104]

*Vinson v. Taylor*[105] is illustrative of the trend to impute auto-

96. *Id.* at 213.
97. *Id.*
98. *Id.*
99. 755 F.2d 599 (7th Cir. 1985).
100. While the Court purported to follow a rule of absolute liability, the opinion indicates that the harassment victim did complain to a higher authority. *Id.* at 602.
101. *Id.* at 605.
102. Suggs, *supra* note 38, at 178.
103. *See, e.g.*, Miller v. Bank of America, 600 F.2d at 213 (the court indicated that because the supervisor invoked his power to fire the employee, respondeat superior was appropriate).
104. Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985).
105. *Id.*

matically liability to the employer for acts of supervisory personnel, regardless of whether or not a loss of tangible job benefits is threatened. In *Vinson* the plaintiff, a bank employee, complied with her supervisor's demands for sex and had intercourse with him approximately forty to fifty times, apparently because she was afraid that refusal would jeopardize her employment.[106] She alleged that at work the supervisor followed her into the women's restroom, exposed himself to her, made lewd remarks, and even forcibly raped her on several occasions on the premises.[107] The employer bank also had an established grievance procedure.[108] While the plaintiff on several occasions pleaded with the supervisor to stop the harassing conduct, she never filed a complaint under the grievance procedure.[109]

The district court ordered judgment for the supervisor on all claims finding that "Vinson was not required to grant Taylor or any other member of the bank sexual favors as a condition of employment," and that if Vinson did engage in a sexual relationship it was "purely a voluntary one, having nothing to do with her continued employment at the bank or her advancement or promotions at the institution."[110] The district court further held that the bank, as employer, could not be held responsible for any infringements by Taylor because "it had no notice of the offensive conduct charged to him."[111]

The court of appeals reversed, holding that the district court had erred in failing to recognize that Vinson had a Title VII claim "simply for pervasive on-the-job sexual harassment" that "illegally poisoned the psychological and emotional work environment," regardless of the absence of any loss or threatened loss of tangible job benefits.[112] The court of appeals also questioned the district court's finding of voluntariness, stating that if the finding meant that there was no harassment, then voluntariness in that sense "had no materiality whatsoever" because "a woman employee need not prove resistance to sexual overtures to establish a Title VII claim of sexual harassment."[113] Furthermore, with respect to employer liability, the court of appeals announced an unqualified rule that "employers must

106. *Id.* at 143.
107. *Id.* at 143-44.
108. *Id.* at 147.
109. *Id.*
110. The district court found that in spite of the alleged conduct, Vinson was not denied timely promotions and salary increases. *Id.* at 146.
111. *Id.* at 147.
112. *Id.* at 145.
113. *Id.* at 146.

answer for the sexual harassment of any subordinate by any supervising superior," regardless of whether or not the employer knew or could have known of the harassment or had an opportunity to stop it.[114] In reaching this conclusion the court reasoned that "[a]n employer's delegation of this much authority vests in the supervisor such extreme power over the employee that the supervisor's stature as 'agent' of the employer cannot be doubted."[115]

The EEOC guidelines are in accord with the position adopted by *Vinson*, *Horn*, and *Miller*, making the employer strictly liable for the acts of supervisory personnel. The guidelines provide:

> Applying general Title VII principles, employer, employment agency, joint apprenticeship, committee or labor organization . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts were forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence.[116]

Consequently, there has been substantial divergence of opinion as to whether an employer is strictly liable for the sexually harassing acts of its supervisory personnel, or whether the employer must receive actual or constructive notice of the conduct and fail to cure it, in order for liability to attach. The United States Supreme Court has recently decided the *Vinson* case and provided some guidelines for determining employer liability for the harassing acts of its supervisory personnel.[117]

## VI. The Supreme Court and *Vinson*

Because *Vinson* is the first sexual harassment case under Title VII that the Supreme Court has decided, it has broad implications for all employers and employees. Although *Vinson* was backed by many women's groups, organized labor and approximately twenty-nine members of Congress, there was still a possibility that the Supreme Court would reject altogether the theory of sexual harassment as a form of sex discrimination.[118] Such a possibility was particularly

114. *Id.* at 149-50.
115. *Id.* at 150.
116. 29 C.F.R. § 1604.11(c) (1984).
117. Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985), *reh'g denied* 760 F.2d 1330 (D.C. Cir. 1985), *aff'd and remanded sub nom.*, Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399 (1986) [hereinafter Meritor Savings Bank v. Vinson].
118. P. Dwyer, *Sexual Harassment: Companies Could be Liable*, BUS. WK., Mar. 31, 1986 at 35.

true when the sexual harassment alleged was of the environmental type.[119]

In its brief, the employer argued that Congress did not intend to regulate the purely psychological aspects of the work environment under Title VII.[120] In support of this position, the Bank cited numerous statements made at the congressional debates supporting the view that Title VII was meant to focus on the equality of opportunity in the tangible, economic benefits of employment.[121]

The view that Title VII was meant to encompass the psychological aspects of the work environment is generally attributed to *Rogers v. EEOC*.[122] *Rogers* was a racial discrimination case in which the plaintiff alleged that his employer had discriminated against him because of his Spanish origin. In his opinion, Judge Goldberg wrote that Title VII was intended statutorily to protect "the employees "psychological as well as economic fringes."[123] However, neither of the other appellate panel members joined in the opinion; one judge concurred in the result but rejected any notion of discrimination in the psychological work environment,[124] and the remaining judge dissented. The dissenting judge also rejected any construction of Title VII purporting to cover discrimination in the intangible aspects of the working environment.[125]

In *Bundy*,[126] the case that created a cause of action for environmental sexual harassment, the court relied heavily on Judge Goldberg's opinion in *Rogers*. The other courts finding a cause of action to exist under Title VII for a hostile working environment have also cited *Bundy* with approval. Consequently, the entire notion of actionable environmental sexual harassment stems from Judge Goldberg's analysis in *Rogers*, an analysis not developed in a sexual harassment case, not essential to the result in that case, and in which no other appellate panel member hearing the case concurred. The Supreme Court, however, found that a cause of action for a harassing work environment exists when the requirements of the EEOC

119. It is unclear whether *Vinson* falls into the environmental category or the quid pro quo category. The court of appeals ordered the district court on remand to accept the theory of environmental harassment. However, if it is found that Vinson quit her job as a result of the hostile environment, the harassment would be quid pro quo since Vinson was constructively discharged.

120. Brief of Petitioner at 30, Meritor Savings Bank v. Vinson, 106 S. Ct. 2399 (1986).

121. *Id.* at ____.

122. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

123. *Id.* at 238.

124. *Id.* at 241-42 (Godbold, J., specially concurring).

125. *Id.* at 245 (Roney, J., dissenting).

126. 641 F.2d 934 (D.C. Cir. 1981).

guidelines are met regardless of whether or not sexual harassment is linked to the grant or denial of an economic quid pro quo.[127] In reaching its decision the Court gave great deference to the EEOC guidelines and relied heavily on the *Rogers* decision.[128] Apparently the Court found itself in a position where, in order to reject the theory of a sexually harassing work environment, it would have had to become entangled within the process of explaining the inherent differences between race and sex.[129] The Court chose not to draw a distinction between race and sex, finding that a cause of action exists for a work environment pervaded with sexual innuendo just as in the case of an environment filled with racial hostility.[130]

Arguably, there is no compelling reason for the tort-like environmental sexual harassment to be encompassed by, and actionable under, Title VII. Title VII provides the limited remedies of injunctions, and reinstatement plus backpay.[131] In the pure hostile work environment situation, the victim still maintains her job, and suffers no loss of pay.[132] If an employee experiences this type of working environment, she would still have a tort action against the individual in which she could obtain damages and whatever equitable relief necessary.[133] As a result, her remedies are no more limited by requiring her to proceed in this fashion rather than under Title VII. If the employee quits as a result of the unpleasantry, a constructive discharge results, and the harassment becomes quid pro quo.[134] When this occurs the employee may then proceed under Title VII to secure reinstatement and whatever other relief is necessary.

After the Supreme Court found that Title VII encompasses environmental sexual harassment, the next question to be answered was whether an employer could be held liable for the acts of supervisory personnel even if management was not aware of the behavior and had no opportunity to remedy the situation.[135] Employers anxiously awaited the Supreme Court's ruling and were greatly relieved

127. Meritor Savings Bank, FSB v. Vinson, 106 S. Ct. 2399, 2405 (1986).
128. 106 S. Ct. at 2405.
129. *Id.*
130. *Id.*
131. *See supra* note 55 and accompanying text.
132. *See supra* notes 29-30 and accompanying text.
133. *See supra* note 54 and accompanying text.
134. *See, e.g.*, Young v. Southwestern Savings and Loan Ass'n, 509 F.2d 140 (5th Cir. 1975); *see also*, DeGrace v. Rumsfeld, 614 F.2d 796, 803 (1st Cir. 1980) (employer held liable for constructive discharge of an employee who had been fired for absenteeism and abuse of sick leave).
135. P. Dwyer, *Sexual Harassment: Companies Could be Liable*, BUS. WK. Mar. 31, 1986 at 35.

when the Court found that employers are not automatically liable for sexual harassment by their supervisors.[136] The Court declined to issue a definitive ruling on the issue. Instead the Court merely laid down guidelines, directing courts to look to traditional agency principles in deciding employer liability for the harassing acts of supervisors.[137] While the Court concluded that Congress' use of the word "agent" in defining "employer" clearly envinced its intent to place some limits on employer liability, the Court also stated that "the absence of notice to an employer does not necessarily insulate that employer from liability.[138] In addition, the Court rejected the view that the mere existence of a grievance procedure, a policy against discrimination, and failure to invoke the procedure on the part of the harassed individual, will protect the employer from liability.[139]

The sigh of relief breathed by employers lasted only as long as it took to read Justice Marshall's concurring opinion, in which three other Justices concurred.[140] Justices Marshall, Brennan, Blackmun, and Stevens, unlike the majority of the Court, felt that the issue of employer liability for its supervisors' actions was squarely presented.[141] Also, unlike the majority of the Court, they concluded that harassment by a supervisor of an employee under his supervision, should automatically be imputed to an employer when a discriminatory work environment results, regardless of whether the employer had notice of the conduct.[142]

Consequently, the Supreme Court's decision in *Vinson*, while resolving any doubt that a cause of action for sexual harassment is appropriate under Title VII, left the issue of employer liability for the harassing acts of its supervisors in a state of turmoil. Several courts which have subsequently addressed the issue of employer liability for acts of supervisory personnel have found guidance in *Vinson*, but that guidance has produced confusion and inconsistent results.[143]

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136. Meritor Savings Bank v. Vinson, 106 S. Ct. at 2408.

137. *Id.*

138. *Id.*

139. 106 S. Ct. at 2409.

140. *Id.* (Marshall, J., concurring, joined by Justices Brennan, Blackmun and Stevens).

141. *Id.*

142. 106 S. Ct. at 2411. The Solicitor General in its amicus brief argued that while strict liability may be appropriate when a tangible job benefit is affected, a special exception is needed in hostile work environment cases because the supervisor "is not exercising or threatening actual or apparent authority to make personnel decisions regarding the victim." 106 S. Ct. at 2410. However, the concurring Justice rejected this position as untenable concluding that "it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates." 106 S. Ct. at 2411.

143. See Rabidue v. Oscoola Refining Co., 805 F.2d 611 (6th Cir. 1986), where the

## VII. Supervisory Acts Imputed to the Employer

Section 706(g) of Title VII imposes an "intent" requirement in order to find an employer liable for discrimination based on sex.[144] The statute does not mention sexual harassment nor does it seem that Congress even considered the problem when it enacted Title VII.[145] The EEOC guidelines do not address the statutory intent requirement and make the employer strictly liable for the acts of its supervisors.[146]

In enacting Title VII, Congress should have recognized that most employers subject to Title VII would be companies whose business is conducted through officers and employees. By specifically providing for an intent requirement it stands to reason that this requirement would be imputed. Requiring actual or constructive notice to an employer gives effect to the intent provision while not imposing an unreasonable burden on the harassed employee. When an employer has notice of the conduct and fails to remedy it, intent to discriminate is fairly imputed because the employer can be said to have endorsed the conduct.[147] Indeed, earlier sexual harassment decisions seemed to recognize implicitly the employer's dilemma, finding that the supervisor's conduct is too personal and cannot be construed as sanctioned company policy without some sort of notice.[148] Additionally, the EEOC guidelines abandon a standard of strict lia-

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sixth circuit, in addressing its first hostile work environment case, interpreted *Vinson* to impose an additional burden on the plaintiff of proving respondeat superior liability, stating that the employee must prove that "the employer, through its agents or supervisory personnel, knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action." *Id.* at 621. However, Judge Keith dissented on the issue of supervisor liability, relying on Justice Marshall's concurring opinion in *Vinson*. Judge Keith felt that liability should be imputed to the employer regardless of actual or constructive knowledge. *Id.* at 625 (Keith, J., concurring in part, dissenting in part). *See also* Volk v. Coler, 638 F.2d 1555 (C.D. Ill. 1986) (court imposed additional burden on plaintiff of proving employer knew or should have known of harassment and failed to take prompt remedial action).

144. 42 U.S.C. § 2000e-5(g) (1982).

145. The insertion of the word sex into the Civil Rights Act of 1964 was added at the last minute and adopted by the House of Representatives without hearing and with little debate. *See generally* Kanowitz, *Sex Based Discrimination in American Law III: Title VII and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305, 310-13 (1968) (discussing the legislative history of Title VII).

146. 29 C.F.R. § 1604.11(c) (1984).

147. This principle finds analogues in tort law. In order to impose punitive damages on an employer for the intentional tort of its employee, the employer must be shown to have participated in the tort, authorized it or ratified it. *See* RESTATEMENT (SECOND) OF TORTS § 909 (1979).

148. *See, e.g.*, Corne v. Bausch & Lomb, 390 F. Supp. 161, 163 (D. Ariz. 1975). "A reasonably intelligent reading of the statute demonstrates that it can only mean that an unlawful employment practice must be discrimination on the part of the employer, Bausch and Lomb." *Id.*

bility for sexual harassment by coworkers, requiring some sort of notice to the employer and the employer's failure to remedy the situation.[149] The guidelines are inconsistent. If an employer is strictly liable for an offensive workplace environment, it should make no difference whether a coworker or a supervisor created that environment.

While in some circumstances it may be appropriate to hold employers strictly liable for quid pro quo harassment by supervisors, it seems inappropriate in hostile environment cases. In the quid pro quo situation a supervisor uses the actual authority delegated to him by the employer to affect a tangible term of employment; he can be fairly said to be invoking the clout of the employer and therefore he in effect becomes the employer.[150] In the hostile work environment situation, however, the supervisor does not threaten any loss of tangible economic benefits, but rather creates an environment which is capable of being created by any individual in the workplace. It is submitted that, in this situation, actual or constructive notice and an opportunity to cure should be required in order for liability to be imputed to the employer.[151]

Furthermore, a company which knows that liability will automatically be imputed to it may simply refuse to take this risk. As a result, management may establish rigid policies either severely limiting social encounters between supervisors and subordinates or prohibiting them altogether. This result is undesirable because interaction between supervisors and subordinates can promote a friendly working atmosphere in the same way that it can promote a hostile

149. *See supra* notes 71-77 and accompanying text.

150. *See supra* note 142.

151. It is interesting to note that in *Vinson* the EEOC argued for a different standard to be applied in hostile work environment cases. Changing its earlier position of strict employer liability for the acts of supervisory employees, the EEOC argued that in hostile work environment cases the test should be:

> Whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employees complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, e.g., by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual notice of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials.

Meritor Savings Bank v. Vinson, 106 S. Ct. at 2408 (citing Brief for United States and Equal Opportunity Employment Commission as Amici Curiae, 26).

atmosphere. Personal relationships between supervisors and subordinates can also be an effective mechanism for enhancing work productivity. If an employer adopts such a policy to protect itself against Title VII liability, another dilemma results because an employee may have a tort action against the employer for adopting such a policy.[152]

The twist presented in *Vinson* was that the person to be notified of the sexual harassment under the established grievance procedure of the bank was the supervisor engaging in the harassing conduct.[153] Complaining to this person would have been futile since it was against the supervisor's interest to disclose his conduct to the employer.[154] Traditional agency law recognizes this problem and provides that notice to an agent whose interest is adverse to the principal cannot be construed as notice to the principal.[155] Consequently, requiring the employee to complain to another person in the employment hierarchy seems reasonable in such a situation, assuming that such an individual exists.[156]

In some situations the corporate officer is so high in the company hierarchy that there is no one else to whom the harassed employee can complain. In this situation, however, the employer can be fairly found to have constructive notice of the harassing conduct because, in effect, the corporate officer is the alter ego of the company.[157] In any event, a broad rule purporting to hold an employer strictly liable for supervisory personnel, regardless of that individual's status in the hierarchy, is clearly an unreasonable burden on the employer.[158] At the very least, when there is someone in a higher

152. Patton v. J.C. Penney Co., 214 Daily Lab. Rep. ____ (1985) (rule against coworker dating is so outrageous that an employer enforcing such a rule may be liable for causing emotional distress).

153. Vinson v. Taylor, 753 F.2d 141, 147, n. 43.

154. The district court found that notice to Taylor could not constitute notice to the employer. *Id.*

155. RESTATEMENT (SECOND) OF AGENCY § 268 and comment C (1968).

156. In *Vinson*, the Division president had not been notified of the conduct. 753 F.2d at 147, n. 43.

157. *See, e.g.*, Clark v. World Airways, Inc., 24 Fair. Empl. Prac. Cas. (BNA) 305, 310 (D.D.C. 1980). The perpetrator held the three highest corporate offices and was 80% stockholder and director. Knowledge of the perpetrator was imputed to the company because perpetrator was an "alter ego" of the company.

158. A recent decision by the Court of Appeals for the Fifth Circuit supports the notion that an employer must receive notice and an opportunity to remedy the harassing environment created by a supervisor, in order to be liable under Title VII. A claim for racial discrimination was filed under Title VII against both the employer and supervisors. The court found that the supervisors fell within the definition of employer under 42 U.S.C. § 2000e-(b) because they were agents of the employer fire company. The court imposed liability on the supervisors individually. However, in addressing the fire department's liability under Title VII the court stated that "while the municipal department should strive to end racial discrimination within its

position than the harassing supervisor, the employee should be required to voice her disapproval to that person, thereby presenting an opportunity for the employer to remedy the situation.

Moreover, a rule imposing absolute liability on an employer may even be detrimental to women in the long run because it seems to perpetuate the stereotypic view that women are passive, meek and helpless.[159] A rule establishing strict employer liability fosters the paternalistic view that women must be protected because they are not assertive enough to complain to a higher authority.[160] Title VII was enacted as a mechanism for ridding the workplace of these traditional stereotypic views,[161] yet a rule imposing strict employer liability without notice may have the opposite effect and serve to perpetuate these stereotypes.

Factually, *Vinson* probably was not the most favorable case to argue for strict employer liability. The employer had an established grievance procedure; Vinson participated in forty to fifty sexual encounters with the supervisor over a two year period, and yet she declined to file a grievance with the Equal Employment Officer who frequently visited the branch.[162] Based on these facts alone it seems unreasonable to impose strict liability on the employer for conduct which it could not possibly have known of and had no opportunity to remedy.

## VIII. Conclusion

While sexual harassment is a serious barrier to women achieving opportunities in employment equal to those enjoyed by men, there are certain limits to the usefulness of Title VII in extinguishing this barrier. Title VII was enacted to provide equality between men and women in the tangible aspects of the workplace, and to rid the workplace of traditional stereotypes contributing to disparate treat-

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ranks, it cannot be held accountable for every bigoted act of its employees. As an employer, it simply lacks the power to guarantee an environment free from *all* bigotry." Hamilton v. Rogers, 783 F.2d 1306, 1309 (5th Cir. 1986). The Court then refused to impute liability to the fire department because the high ranking officials, upon learning of the incidents, promptly acted to discourage such conduct in the future. *Id.*

159. One commentator suggests that the labeling of an act for the protection of psychotherapy patients "The Vulnerable Adults Act," may add to the stereotype depicting women as weak, vulnerable, and needing protection. Since the majority of claimants in sexual harassment cases are women, a strict liability standard may also add to the validity of this stereotype. J. Bouhoutsos, *Therapist-Client Sexual Involvement: A Challenge for Mental Health Professionals and Educators*, 55 AM. J. ORTHOPSYCHIATRY, 177, 180 (1985).

160. *Id.*

161. *See, e.g.*, Ford Motor Co. v. EEOC, 458 U.S. 219, 230 (1982).

162. *See supra* text accompanying notes 106-109.

ment with respect to those tangible aspects. Extending Title VII principles beyond the scope for which they were intended may serve to perpetuate stereotypes rather than eliminate them. Indeed, a rule imposing strict liability on an employer for the acts of its supervisors may actually foster the view that females are incapable of being assertive and must be protected at all costs. While the Supreme Court has found that Title VII was meant to protect the purely psychological aspects of the workplace, a rule somewhere short of strict liability is necessary. Requiring notice to the employer and an opportunity to cure the hostile environment strikes an ideal balance between proper Title VII construction and fairness to both the employer and the harassed individual.

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** Periodically, the Dickinson Law Review publishes quality legal articles written by Dickinson School of Law students who are not members of the Dickinson Law Review. Mr. Conway submitted this article to fulfill the requirement of a course entitled Gender and the Law.